



SBA Information Notice

TO: All SBA Employees

**CONTROL
NO.:**

7000-173

SUBJECT: Issues with franchise, dealer, license,
jobber or related agreements - Gas
Stations and Minimarts

EFFECTIVE: 2/5/2008

SBA has determined that an increasing number of franchise, dealer, license, jobber and related agreements (including grantor deeds and deeds of trust) between major oil companies or jobbers and applicant businesses for the operation of gas stations and minimarts contain provisions that do not comply with SBA eligibility and/or credit requirements.

Size/Affiliation Issues with Gas Stations and Minimarts:

When an applicant business operates a gas station and/or minimart under a franchise, dealer, license, jobber or related agreement with a major oil company or jobber, and the major oil company or jobber that issued the agreement is not listed on the *Franchise Registry* (www.franchiseregistry.com), SBA employees, Lenders and CDCs must review the agreement in order to determine if it contains any conditions which would create affiliation between the two parties. (Currently, there are no major oil companies or jobbers listed on the *Franchise Registry*.) If affiliation is found to exist, then the applicant business is deemed to be part of a collective group and the affiliates' receipts or number of employees must be aggregated for size determination purposes. If an affiliate is not small, then the applicant is not small and is therefore ineligible for SBA assistance.

13 CFR §121.103(i) of SBA's Size Standard Regulations outlines how an applicant business operating under a franchise, dealer, license, jobber or related agreement from another business may be affiliated with that business and may be ineligible. This regulation says:

(i) Affiliation based on franchise and license agreements - - - *The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.*

Appendix 3(e) of SOP 70 50 (3), the SOP covering *Legal Responsibilities*, gives guidance on the types of conditions which may be found in a franchise, dealer, license, jobber or related agreement that are not acceptable to SBA and which, if present, should be reviewed for a determination of eligibility. (Found at www.sba.gov/aboutsba/sbaprograms/elending, then click on "Regulations and SOPs" which will take you to a listing of SOPs.)

EXPIRES: 2/1/2009

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SBA Form 1353.1 (12-93) MS Word Edition; previous editions obsolete
Must be accompanied by SBA Form 58

Past SBA reviews of certain franchise, dealer, license, jobber and related agreements between major oil companies or jobbers and applicant businesses operating gas stations and/or minimarts have identified certain covenants that have resulted in a finding of ineligibility due to size/affiliation issues. The following are examples (though not a complete listing) of unacceptable conditions appearing in these agreements:

- A condition that gives the franchisor the absolute discretion to approve a transfer of the agreement.
- A condition where the franchisee could not transfer its interest in the franchise without the prior written consent of the franchisor, which could be withheld by the franchisor for any reason in the franchisor's sole subjective judgment.
- A condition where the franchisor had the ability to choose counsel for the franchisee's defense of legal disputes.
- A condition prohibiting the franchisee from transferring or assigning its rights under the agreement.

Lenders and CDCs can inquire about the availability of information regarding eligibility concerns surrounding a particular franchise, dealer, license, jobber or related agreement by sending an e-mail to franchise@sba.gov.

Credit Issues with Gas Stations and Minimarts:

As a reminder, SBA previously issued Information Notice 5000-987 entitled *Deed Restrictions Pertaining to Gas Stations*. (Available at www.sba.gov/aboutsba/sbaprograms/elending, then click on "Notices," then click on FY 2006.) In the Notice, SBA stated that deed restrictions imposed by major oil companies regarding the brand of service station that may be operated on the real estate being sold to, or owned by, the applicant business are not acceptable to SBA because they severely compromise the marketability of the business real estate collateral that would be securing the SBA-guaranteed loan.

Similarly, other provisions found in agreements with or deeds from major oil companies or jobbers have been found by SBA to be unacceptable as they have a significant impact on the value and marketability of the business real estate collateral, specifically:

- "Repurchase Options" which allow a major oil company or jobber to repurchase the applicant's primary business asset (e.g., real estate) due to a violation of any condition, covenant or restriction in any agreement between the oil company or jobber and the applicant business. (Please note that "Rights of First Refusal," which allow an oil company or jobber to match future third party offers for the purchase of the gas station, are generally acceptable to SBA.)
- Covenants running with the land that require current and future owners to indemnify a major oil company for environmental contamination. In the event participant lenders,

CDCs or the SBA were to foreclose upon the real estate or accept a deed in lieu, they could be required to indemnify a major oil company for environmental contamination.

Subordination of these unacceptable provisions is insufficient to overcome the credit concerns.

SBA employees are instructed to transmit this Notice to Lenders and CDCs. Any questions regarding this Notice should be referred Steve Olear at stephen.olear@sba.gov in the Office of General Counsel.

Grady B. Hedgespeth
Director, Office of Financial Assistance

Frank R. Borchert
General Counsel